Nazrul Imran bin Mohd Nor v Civil Service Commission Malaysia & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-397–06 OF 2018
MOHAMAD ZABIDIN, ABU BAKAR JAIS AND DARRYL GOON JJCA
5 OCTOBER 2021

Administrative Law — Judicial review — Certiorari to quash decision of respondents — Appeal against High Court's decision in dismissing judicial review application — Appellant wrote comment on Prime Minister's Facebook post — Appellant was dismissed from public service by first respondent based on rr 4(2)(d), (g) and 19(1)(b) of the Public Officers (Conduct and Discipline) Regulations 1993 ('1993 Regulations') — Whether High Court judge erred in holding that correctness of first respondent's decision against appellant should not be within purview of courts — Whether respondents duty bound to explain and give reasons for rejecting appellant's representation — Whether appellant's comment contravened rr 4(2)(d), (g) and 19(1)(b) of the 1993 Regulations — Whether appellant's comment may embarrass or bring disrepute to government — Whether punishment of dismissal from public service was disproportionate and unreasonable — Public Officers (Conduct and Discipline) Regulations 1993 rr 4(2)(d), (g), 19(1)(b), 35(2), 37 & 38(g)

The appellant was a diplomatic officer grade M44, placed in the Ministry of Foreign Affairs as the second secretary of the Government of Malaysia ('the second respondent'). The appellant had made a comment stating 'Kesian. Hilang kwn, hilang deposit' ('the appellant's comment') in a condolence message posted by the then Prime Minister, Dato' Sri Mohd Najib bin Tun Abdul Razak in his Facebook on the death of Tan Sri Adenan Satem, the Chief Minister of Sarawak. Consequently, based on the determination under reg 35(2) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'), disciplinary proceedings were commenced against the appellant with the intention of dismissal or reduction in rank under reg 37 of the 1993 Regulations. The appellant was charged under reg 19(1)(b) of the 1993 Regulations and in the said charge, the Public Service Commission ('the first respondent') also stated that the appellant's conduct was also in contravention of reg 4(2)(d) and (g) of the 1993 Regulations. The first respondent found that the appellant's representation that his comment was not directed at the Government of Malaysia, that he had meant to console the Prime Minister for the loss of his friend and that his comment had been misinterpreted and distorted to his detriment did not exculpate him from the said charge. The appellant was found guilty as charged and the appellant was dismissed from service under reg 38(g) of the 1993 Regulations ('the first

respondent's decision'). The appellant then filed an application pursuant to O 53 of the Rules of Court 2012 for judicial review. The appellant sought for an order of certiorari to quash the first respondent's decision and a declaration that he was at all material times, and still was, an employee of the second respondent and was therefore entitled to his salaries and benefits from the date of his dismissal. The learned High Court judge ('the HCJ') found in favour of the respondents and held, inter alia, that the correctness of the decision made by the first respondent against the appellant should not be within the purview of the courts. The HCJ therefore dismissed the appellant's application. Aggrieved by the decision, the appellant filed the present appeal. The issue to be determined was whether the appellant's comment contravened rr 4(2)(d), (g) and 19(1)(b) of the 1993 Regulations. In respect of the punishment, the appellant submitted that: (a) other public servants who had been charged under the same regulations were penalised with lighter punishment; and (b) the punishment meted out was clearly excessive in contravention to art 8 of the Federal Constitution.

Held, allowing the appeal, setting aside the High Court's order, granting an order of certiorari to quash the decision of the first respondent and allowing a declaration that the appellant was entitled to all salaries and benefits from the date of his purported dismissal:

(1) Premised on s 69(1) of the Courts of Judicature Act 1964 ('CJA'), this was a rehearing of the appellant's application for judicial review, therefore, the whole application for judicial review in this case could be treated as coming before the court afresh for the first time, despite the decision of the High Court. In addition, s 69(4) of the CJA provided that the Court of Appeal may, inter alia, give any judgment and make any orders which ought to have been made or given (see para 43).

(2) The HCJ had erred in holding that the correctness of the decision made by the first respondent against the appellant should not be within the purview of the courts. The Federal Court cases of *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another* [2018] 2 MLJ 537 and *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 were authorities from the highest court to say unequivocally the merits of the decision of the first respondent could be probed and questioned by the courts. Thus, these authorities recognised in essence the supervisory function of the courts to scrutinise the decision made. Based on the above findings, the court concluded that in exercising its appellate function the court had the power to review and examine the substance and merits of the decision of the first respondent (see paras 45 & 53–54).

(3) It was incumbent on both respondents not to merely say the appellant did not exculpate himself in respect of the charge against him by the representation he had sent. These statements made that were without any basis given, no matter how strenuously made, remained devoid of any substance or weight. Both the respondents, especially the first respondent, were duty bound to explain and give reasons for rejecting the grounds given by the appellant in his representation in answering the charge, but this was not done as was evident from the affidavits filed. Further, the failure of the first respondent to explain why the appellant was found not able to exculpate himself, also gave credence to the contention that the first respondent did not sufficiently consider the appellant's defences (see paras 65–66).

(4) Even if the appellant's comment was to be taken as a whole it could not be an embarrassment or disrepute to the government itself because: (a) it was not only too short but more importantly, too cryptic; (b) different groups of people may interpret the statement differently; and (c) the government itself could not possibly be affected by the statement. All the above findings of the court were made possible by the failure of the first respondent to give reasons for its decision. In the absence of reasons by the first respondent, the explanations above stand as grounds why the appellant should not have been found guilty of the charge levelled against him (see paras 76 & 80).

(5) Both the respondents chose not to reply to the appellant's affidavit on the point regarding lesser punishment of reduction in rank for prior similar case against one Mohd Radzi bin Mansor who was also charged for tarnishing the name of the Government of Malaysia. The failure to reply, coupled with the lack of any explanation, meant that the respondents accepted the assertion of the appellant regarding the fact of the disparity in the sentences meted out. Further, the appellant was not accorded with the right to mitigate. Rightly, the decision of the first respondent ought not to stand based on this reason too. In any event, the appellant's statement even if rightly objectionable, did not justify so extreme a punishment such as an outright dismissal. The statement was trivial and innocuous, therefore, the punishment of dismissal from service was disproportionate if not also unreasonable especially considering the good track record of the appellant. In any event, as the appellant did not contravene the statutory provisions, no punishment should be meted out (see paras 81–82 & 87–88).

[Bahasa Malaysia summary

Perayu merupakan pegawai diplomatik gred M44, ditempatkan di Kementerian Luar Negeri sebagai setiausaha kedua Kerajaan Malaysia ('responden kedua'). Perayu telah menulis komen yang menyatakan 'Kesian. Hilang kwn, hilang deposit' ('komen perayu') dalam ucapan takziah yang

disiarkan oleh Perdana Menteri ketika itu, Dato' Sri Mohd Najib bin Tun Abdul Razak dalam Facebooknya mengenai kematian Tan Sri Adenan Satem, Ketua Menteri Sarawak. Akibatnya, berdasarkan peruntukan di bawah peraturan 35(2) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan 1993'), prosiding tatatertib telah dimulakan terhadap perayu dengan niat untuk pemecatan atau penurunan pangkat di bawah peraturan 37 Peraturan 1993. Perayu didakwa di bawah peraturan 19(1)(b) Peraturan 1993 dan dalam pertuduhan tersebut, Suruhanjaya Perkhidmatan Awam ('responden pertama') juga menyatakan bahawa kelakuan perayu juga melanggar peraturan 4(2)(d) dan (g) Peraturan 1993. Responden pertama mendapati bahawa representasi perayu bahawa komennya tidak ditujukan kepada Kerajaan Malaysia, bahawa dia berniat untuk menenangkan Perdana Menteri atas kehilangan rakannya dan bahawa komennya telah disalah tafsir dan diputarbelitkan sehingga merugikan dirinya tidak mengecualikannya daripada pertuduhan tersebut. Perayu didapati bersalah seperti yang didakwa dan perayu telah dipecat di bawah peraturan 38(g) Peraturan 1993 ('keputusan responden pertama'). Perayu kemudiannya memfailkan permohonan menurut A 53 Kaedah-Kaedah Mahkamah 2012 untuk semakan kehakiman. Perayu memohon perintah certiorari untuk membatalkan keputusan responden pertama dan deklarasi bahawa dia pada setiap masa yang material, dan masih, pekerja responden kedua dan oleh itu berhak mendapat gaji dan faedah dari tarikh pemecatannya. Hakim Mahkamah Tinggi yang bijaksana ('HMT') membuat keputusan yang memihak kepada responden-responden dan berpendapat, antara lain, bahawa persoalan terhadap ketepatan keputusan yang dibuat oleh responden pertama terhadap perayu tidak seharusnya berada dalam bidang kuasa mahkamah. Oleh itu HMT menolak permohonan perayu. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa. Isu yang perlu ditentukan ialah sama ada komen perayu melanggar peraturan 4(2)(d), (g) dan 19(1)(b) Peraturan 1993. Berkenaan dengan hukuman, perayu berhujah bahawa: (a) penjawat awam lain yang telah didakwa di bawah peraturan yang sama telah dihukum dengan hukuman yang lebih ringan; dan (b) hukuman yang dijatuhkan adalah jelas keterlaluan bercanggah dengan perkara 8 Perlembagaan Persekutuan.

Diputuskan, membenarkan rayuan, mengenepikan perintah Mahkamah Tinggi, memberikan perintah certiorari untuk membatalkan keputusan responden pertama dan membenarkan satu deklarasi bahawa perayu berhak mendapat semua gaji dan faedah bermula dari tarikh pemecatannya:

(1) Berdasarkan s 69(1) Akta Mahkamah Kehakiman 1964 ('AMK'), ini adalah pendengaran semula permohonan perayu untuk semakan kehakiman, oleh itu, keseluruhan permohonan untuk semakan kehakiman dalam kes ini boleh dianggap sebagai perbicaraan baru di hadapan mahkamah buat kali pertama tanpa mengambil kira keputusan Mahkamah Tinggi. Di samping itu, s 69(4) AMK memperuntukkan

bahawa Mahkamah Rayuan boleh, antara lain, memberikan apa-apa penghakiman dan membuat apa-apa perintah yang sepatutnya telah dibuat atau diberikan (lihat perenggan 43).

(2) Hakim Mahkamah Tinggi telah terkhilaf dalam memutuskan bahawa persoalan terhadap ketepatan keputusan yang dibuat oleh responden pertama terhadap perayu tidak seharusnya berada dalam bidang kuasa mahkamah. Kes-kes Mahkamah Persekutuan *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another* [2018] 2 MLJ 537 dan *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 adalah autoriti-autoriti dari mahkamah tertinggi untuk menyatakan dengan jelas merit keputusan responden pertama boleh diteliti dan dipersoalkan oleh mahkamah. Oleh itu, autoriti-autoriti ini pada dasarnya mengiktiraf fungsi penyeliaan mahkamah untuk meneliti keputusan yang dibuat. Berdasarkan dapatan di atas, mahkamah membuat kesimpulan bahawa dalam melaksanakan fungsi rayuannya mahkamah mempunyai kuasa untuk menyemak dan meneliti kandungan dan merit keputusan responden pertama (lihat perenggan 45 & 53–54).

(3) Adalah menjadi tanggungjawab kedua-dua responden untuk tidak hanya menyatakan perayu tidak boleh mengecualikan dirinya berhubung pertuduhan terhadapnya melalui representasi yang dihantarnya. Kenyataan yang dibuat ini tanpa apa-apa asas diberikan, tidak kira bagaimana ia ditekankan, kekal tanpa apa-apa kandunagn atau pemberatan. Kedua-dua responden, terutamanya responden pertama, bertanggungjawab untuk menjelaskan dan memberi ulasan untuk menolak alasan yang diberikan oleh perayu dalam representasinya dalam menjawab pertuduhan, tetapi ini tidak dilakukan seperti yang terbukti daripada afidavit yang difailkan. Selanjutnya, kegagalan responden pertama untuk menjelaskan mengapa perayu didapati tidak dapat mengecualikan dirinya, juga menyokong hujahan bahawa responden pertama tidak mempertimbangkan dengan secukupnya pembelaan perayu (lihat perenggan 65–66).

(4) Walaupun jika komen perayu diambil secara keseluruhan, ia tidak boleh memalukan atau mencemarkan nama baik Kerajaan kerana: (a) ia bukan sahaja terlalu pendek tetapi yang lebih penting, ianya terlalu samar; (b) kumpulan orang yang berbeza boleh mentafsir pernyataan tersebut secara berbeza; dan (c) kerajaan sendiri tidak mungkin terjejas oleh kenyataan tersebut. Semua dapatan mahkamah di atas adalah disebabkan oleh kegagalan responden pertama untuk memberikan alasan untuk keputusannya. Sekiranya tiada alasan oleh responden pertama, penjelasan di atas adalah alasan mengapa perayu tidak sepatutnya

didapati bersalah atas pertuduhan yang dilemparkan terhadapnya (lihat perenggan 76 & 80).

(5) Kedua-dua responden memilih untuk tidak menjawab afidavit perayu berhubung hukuman ringan penurunan pangkat bagi kes yang sama sebelum ini terhadap seorang Mohd Radzi bin Mansor yang juga didakwa kerana mencemarkan nama Kerajaan Malaysia. Kegagalan untuk menjawab, berserta dengan ketiadaan apa-apa penjelasan, bermakna responden menerima hujahan perayu berhubung fakta perbezaan dalam hukuman yang dijatuhkan. Selanjutnya, perayu tidak diberikan hak mitigasi. Sememangnya, keputusan responden pertama tidak boleh dipertahankan berdasarkan alasan ini juga. Dalam apa jua keadaan, kenyataan perayu walaupun benar-benar tidak menyenangkan, tidak mewajarkan hukuman yang begitu melampau seperti pemecatan secara terus. Kenyataan tersebut adalah remeh dan tidak berbahaya, justeru, hukuman pemecatan bukan sahaja tidak setimpal malahan juga tidak munasabah terutamanya mengambil kira rekod prestasi perayu yang baik. Dalam apa jua keadaan, oleh kerana perayu tidak melanggar peruntukan statutori, tiada hukuman harus dikenakan (lihat perenggan 81–82 & 87–88).]

Cases referred to

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee Bt Abdullah And Another [2018] 2 MLJ 537, FC (folld)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

Country Garden Danga Bay Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor [2020] MLJU 81; [2020] 1 LNS 92, CA (refd)

Government of Malaysia v Rosalind Oh Lee Pek Inn [1973] 1 MLJ 222, FC (refd)

Government of Malaysia v Zainal bin Hashim [1977] 2 MLJ 254, FC (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (folld)

Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361, FC (refd)

Ng Hee Thong & Anor v Public Bank Berhad [2002] 2 MLJ 29, CA (refd)

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 404, FC (refd)

Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors [2021] 3 MLJ 1, CA (refd)

Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu

(substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573, FC (refd)
R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (folld)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (folld)
T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan satu lagi [2005] 6 MLJ 97; [2005] 3 CLJ 302, CA (refd)

Legislation referred to

Courts of Judicature Act s 69(1), (4)
Federal Constitution arts 8, 10(1)(a), 43, 135, 135(2)
Public Officers (Conduct and Discipline) Regulations 1993 regs 4(2)(d), (2)(g), 19(1)(b), 35(2), 37, 38(g)
Rules of Court 2012 O 53

Appeal from: Civil Suit No WA-25–130–05 of 2017 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Wong Ming Yen and Phoebe Loi Yean Wei with him) (Thomas Philip) for the appellant.
Nazri Ismail (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Abu Bakar Jais JCA:

INTRODUCTION

[1] This is an appeal lodged by the appellant against the decision of the learned High Court judge ('HCJ') in dismissing an application pursuant to O 53 of the Rules of Court 2012 for judicial review. The relief sought by the appellant was for an order of certiorari to quash the first respondent's decision to dismiss the appellant from public service.

[2] Also sought by the appellant was a declaration that the appellant was at all material times, and still is, an employee of the second respondent and is therefore entitled to his salaries and benefits from the date of his dismissal.

BACKGROUND FACTS

[3] The appellant was a diplomatic officer grade M44, placed in the Ministry of Foreign Affairs as the Second Secretary (Political, Economy, Training and Education) of the second respondent.

[4] At the material time, 11 January 2107, the appellant was stationed and

held his post at the Malaysian Embassy in Manila, Philippines.

[5] He had posted comments on the Facebook of the then Prime Minister of Malaysia, Dato' Sri Mohd Najib bin Tun Abdul Razak ('DS Najib'). The appellant's comments then led to disciplinary action being taken against him.

[6] Upon learning of the death of Tan Sri Adenan Satem, the Chief Minister of Sarawak, DS Najib, wrote a condolence message in his Facebook. The appellant responded to this message by writing his comments as follows:

> Kesian. Hilang kwn, hilang deposit
>
> Translation — Pity. Lost a friend, lost the deposit

[7] Premised on the above statement, disciplinary proceedings were commenced against the appellant. The Chairman of the Disciplinary Board of the Public Service Management Group (No 2) (Pengerusi Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No 2)) made a determination under reg 35(2) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations') that the disciplinary proceeding against the appellant was with the intention of dismissal oregreduction in rank under reg 37 of the 1993 Regulations.

[8] The chairman then referred the disciplinary proceedings against the appellant to the chairman of the Disciplinary Authority of the Public Services Commission ('PSC or the first respondent') who is empowered to proceed accordingly under the said reg 37 of the 1993 Regulations.

[9] The Chairman of the Disciplinary Authority of the PSC, having considered all the available information, found a prima facie case against the appellant and directed that he be charged under reg 19(1)(b) of the 1993 Regulations.

[10] The charge presented against the appellant read as follows:

> Bahawa tuan, Nazrul Imran bin Mohd Nor (K.P.: 780203-05-5395), Pegawai Tadbir dan Diplomatik Gred M44, semasa bertugas sebagai Setiausaha Kedua di Kedutaan Besar Malaysia, Manila, Filipina, Kementerian Luar Negeri, pada 11.1.2017 *melalui akaun laman Facebook Nazrul Imran telah membuat pernyataan 'Kesian. Hilang kwn, hilang deposit' dalam ruangan komen laman Facebook Najib Razak yang merupakan laman Facebook rasmi YAB Dato' Sri Mohd Najib bin Tun Abdul Razak, Perdana Menteri Malaysia bertarikh 11.1.2017 pada jam 2.51 petang yang merakamkan ucapan takziah di atas kematian Ketua Menteri Sarawak.* Pernyataan tuan tersebut yang disifatkan menghina, mengeji dan mengutuk YAB Perdana Menteri Malaysia selaku ketua pemerintahan tertinggi Kerajaan Malaysia boleh memalukan dan memburukkan imej dan nama Kerajaan Malaysia serta boleh

menimbulkan persepsi negatif di kalangan orang awam.

Perbuatan tuan boleh disifatkan sebagai melanggar subperaturan 19(1)(b). Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 seperti berikut:

> Seseorang pegawai tidak boleh, secara lisan atau bertulis atau dengan apa-apa cara membuat apa-apa pernyataan awam yang boleh memalukan atau memburukkan nama Kerajaan

Perbuatan tuan tersebut juga boleh ditafsirkan sebagai berkelakuan dengan sedemikian cara sehingga memburukkan nama atau mencemarkan nama perkhidmatan awam dan tidak bertanggungjawab iaitu bercanggah dengan subperaturan 4(2)(d) dan (g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 seperti berikut:

Seseorang pegawai tidak boleh —

> (d) berkelakuan dengan sedemikian cara sehingga memburukkan nama atau mencemarkan nama perkhidmatan awam dan
>
> (g) tidak bertanggungjawab.

Jika tuan didapati bersalah atas pertuduhan di atas, tuan boleh dihukum mengikut Peraturan 38, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993. (Emphasis added.)

[11] A show cause letter containing the charge against the appellant was issued, served and received by the appellant. The appellant was given 21 days from the date of receipt of the show cause letter to furnish his representation to exculpate himself from the charge against him.

[12] A representation letter was indeed sent by the appellant to the Secretary of the first respondent. Thereafter, the first respondent was of the view that the representation by the appellant did not exculpate him from the charge against him and found him guilty as charged and the appellant was dismissed from service under reg 38(g) of the 1993 Regulations.

[13] Dissatisfied with the decision of the first respondent, the appellant filed an application for judicial review before the High Court. After considering the appellant's application, the High Court upheld the decision of the first respondent. Thus, the appellant came before us in his appeal against the decision of the High Court.

AT THE HIGH COURT

[14] The learned HCJ basically found that in a judicial review, the courts should not hear and determine the merits of decisions made by inferior tribunals. The learned HCJ referred to the decision of the Court of Appeal in

T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan satu lagi [2005] 6 MLJ 97; [2005] 3 CLJ 302 for this proposition. The following words in that case were referred to by the learned HCJ:

> Mengenai perkara ini ingin kami merujuk kepada keputusan House of Lords di dalam kes Chief Constable of *North Wales Police v Evans* [1982] 3 All ER 141 yang menyatakan:
>
> > *Judicial review is not an appeal from a decision but a review of the manner in which the decision was made, and, therefore the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable.*
> >
> > Judicial review is concerned, not with the decision, but with the decision — making process. Unless the restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power.
>
> Menyentuh soal yang sama di dalam kes *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487; [1988] 1 CLJ 559; [1988] 2 CLJ Rep 390, Edgar Joseph Jr J (beliau ketika itu) di dalam penghakimannya menyatakan:
>
> > I would at the outset say that in considering these applications I have kept in the forefront of my mind the basic principles to be distilled from a number of cases upon which courts will review decisions of public authorities and inferior tribunals.
> >
> > The basic principles may be stated thus:
> >
> > (1) judicial review applies to anybody of persons having legal authority derived from public law to determine questions affecting the rights of subjects whether that right is derived from statute or from the common law;
> >
> > (2) the High Court is not a Court of Appeal from the body under review;
> >
> > (3) the High Court limits itself to determining whether the public authority or inferior tribunal has acted lawfully, rationally and with due regard to proper procedures;
> >
> > (4) *the court will not substitute its judgment or discretion for the judgment or discretion of the body under review*;
> >
> > (5) facts determined by the body under review are rarely open to review in the High Court;
> >
> > (6) the High Court will intervene unless there is express statutory direction to the contrary;
> >
> > (7) if there is an established appeal procedure from the decision of the body under review the court usually prefers this course to be followed;
> >
> > (8) only activities of a public nature can be the subject of judicial review. (Emphasis added.)

[15] At p 10 of the grounds of decision, the learned HCJ did not accept the contention of the appellant that his statement in Facebook was not directed at the Government of Malaysia. The learned HCJ in this respect found that under art 43 of the Federal Constitution, DS Najib, being the then Prime Minister was a member of the administration of the Federation, the Government of Malaysia. DS Najib was thus part of Government of Malaysia.

[16] The learned HCJ also found that the appellant upon joining the civil service, must be subjected to the relevant laws including the 1993 Regulations. Regulation 19(1)(b) of the 1993 Regulations could not be said to render the appellant's right of expression illusory. Therefore, the learned HCJ found no merit on the issue of illegality raised by the appellant. The learned HCJ was of the opinion that the decision of the PSC in finding that the appellant had failed to exculpate himself from the charge was not irrational or unreasonable as it was up to the PSC to so decide. The learned HCJ referred to the Federal Court case of *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 where the apex court said as follows:

> [36] The courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. The courts will only intervene in disciplinary cases where there was a fundamental procedural flaw. The courts cannot exceed its role in cases of this genre as the instant appeal. *The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence*. Weighing and assessing the evidence is the function of the disciplinary authority which is the body to which the legislature has entrusted the responsibility of deciding the issue, and not the courts. *Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has been an error in the process or whether there was procedural irregularity in the decision making proceedings leading to the public officer's dismissal*. (Emphasis Added.)

[17] Also referred to by the learned HCJ was the decision of the Federal Court in *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573 where it was held as follows:

> [44] From these GOs, it can be clearly concluded that it is the disciplinary authority and not the court who is to decide whether the officer in his written representation has exculpated himself. The answer to Question (iii) must therefore be answered in the negative ie, *that it is not the court but disciplinary authority who is to decide this question of whether he has exculpated himself by his written representation*. (Emphasis added.)

[18] The learned HCJ found that the appellant had been accorded the rights given under the 1993 Regulations and the PSC had given due consideration to his representations. The PSC found that the appellant had failed to exculpate

himself from the charge. The appellant himself had referred to adverse comments by third parties to his posting. As such his comments had caused embarrassment or had brought disrepute to the Government of Malaysia as the comments were made against the head of the executive branch of the Government of Malaysia. His comments became viral in the social media and attracted adverse comments which were insulting, nasty and disrespectful to the deceased, the former Chief Minister of Sarawak.

[19] Therefore, the conduct of the appellant brought the public service into disrepute and had discredited the public service within the meaning of reg 4(2)(d) of the 1993 Regulations. He was also irresponsible in making the comments thus falling within the ambit of reg 4(2)(g) of the 1993 Regulations. Hence, the learned HCJ found that the decision of the PSC was not irrational or unreasonable.

[20] In respect of the appellant's submission that the sentence by the PSC was disproportionate, the learned HCJ found that the PSC had acted in accordance with the 1993 Regulations.

[21] The appellant in his written representation did not deny his posting but sought to explain the same. He did not maintain that the charge against him was defective or irregular. Instead, he explained what is meant by his words or comments. He contended that his comments had been misinterpreted by third parties.

[22] Having considered his written representation, the learned HCJ found that the PSC had acted in accordance with the 1993 Regulations. The appellant had tried to explain and justify the statement that he had posted and it was within the powers of the PSC to decide whether to accept the representation and the explanation proffered by the appellant.

[23] The learned HCJ considered appellant's contention that the punishment of dismissal from public service was excessive under the circumstances of this case and that similar cases had resulted in lighter punishments. However, the learned HCJ referred to the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 404 where it was stated that an employer would be the best person to know the most appropriate punishment to be meted out to its employees.

[24] In respect of the appellant's contention that there was procedural impropriety because there was no oral hearing accorded to the appellant before the PSC, the learned HCJ found there was no request for such a hearing by the appellant himself. Further, the appellant did not dispute the substance of the charge and had in fact admitted what he wrote but merely wanted to explain

what the words of his posting meant. The right to be heard under art 135(2) of the Federal Constitution does not mean a right to be heard orally. The right is only for the case of the appellant to be stated as provided by the 1993 Regulations. In this case, according to the learned HCJ, the SPA had complied with the said Regulations. The learned HCJ also found that it was not true that one Mohd Husaini bin Saidi from the Public Service Department had informed the appellant that an oral hearing will not be given to him. Further, the learned HCJ found that under the 1993 Regulations, it is up to the PSC whether a committee of inquiry is needed to obtain any further clarification from the appellant.

SUMMARY OF THE APPELLANT'S CONTENTIONS

[25] For the present appeal, the appellant argued that DS Najib could not be considered as the Government of Malaysia. The comments were not in any way directed at the Government of Malaysia and as such, it could not be said that it had brought disrepute to the Government. The comments made by the appellant could not cause any embarrassment or bring any disrepute to the Government of Malaysia or the public service. The decision of the PSC was one that could reasonably be viewed as having been made to appease the DS Najib, thus running counter to the need to give primacy to the protection of holders of public office. Therefore, reg 19(1)(b) of the 1993 Regulations could not be applicable against the appellant. The dismissal of the appellant was both unreasonable and disproportionate.

[26] Besides, the 1993 Regulations could not preclude the appellant's freedom of expression.

[27] The appellant should be given the right of hearing. The denial of a right to be heard, in respect of the punishment to be meted out as well, had prejudiced the appellant greatly.

[28] The appellant also contended that his statement was made with good intentions. He claimed that he had intended to console and support the former PM as the latter had lost a friend. He never intended to violate any laws or regulations. The comments had been mischaracterised and manipulated by many parties.

[29] The appellant had already suffered tremendously as he and his family have had to endure numerous threats. He had also lost his special status as a diplomat and was made to return to Malaysia on an urgent basis.

[30] The appellant had been in the employment of the Government of Malaysia for eight years and has had a good record. The appellant had had to

stop the physiotherapy treatment that he had been undergoing since 2012 because of the controversy. He was, and still is, the sole breadwinner of his family.

[31] Other public servants who had been charged under the same Regulations were penalised with lighter punishments.

[32] In any event, the punishment meted out was clearly excessive and runs counter to art 8 of the Federal Constitution.

SUMMARY OF THE RESPONDENTS' CONTENTIONS

[33] In turn, the respondents submitted that the decision to dismiss the appellant was lawfully made. Both the Federal Constitution and the 1993 Regulations had been complied with by the respondents in dismissing the appellant.

[34] The Chairman of the Disciplinary Authority of the first respondent had acted within his powers pursuant to reg 37 of the 1993 Regulations in respect of the disciplinary action and subsequently in dismissing the appellant.

[35] The Chairman had the power to issue the charge against the appellant upon finding a prima facie case against the appellant. The respondents also submitted that what is important to consider is that the charge contained the facts of the disciplinary offence committed and the grounds upon which it is proposed to dismiss the appellant.

[36] The written representation sent by the appellant did not dispute the charge and he did not say that he did not understand the same. He also did not contend that the charge was defective.

[37] It is for the respondents to judge the seriousness of the misconduct of the appellant as its employee. The respondents too would be the best party to decide the form of punishment against the appellant.

[38] There must be overwhelming evidence to suggest that the respondents acted unreasonably in dismissing the appellant.

[39] There was no procedural impropriety in the respondents' actions to take disciplinary proceeding and to dismiss the appellant. All relevant provisions of the 1993 Regulations had been complied with by the respondents. As such, no issue of illegality on the part of the respondents had been demonstrated by the appellant.

[40] The right to be heard had been provided to the appellant and this right does not necessarily mean that it may only be satisfied by an oral hearing. The hearing by way of written representation accorded to the appellant was sufficient for the disciplinary proceeding and the subsequent dismissal of the appellant. As the appellant was given the right to provide his written representation, he had exhausted his right to be heard pursuant to art 135 of the Federal Constitution.

[41] There was no need for further clarification by the disciplinary authority and therefore there was no need for the appellant to be given an oral hearing.

OUR DECISION

[42] As a matter of convenience, the reasons for our decision are divided into the subheadings below.

Rehearing

[43] First, this is a rehearing of the appellant's application for judicial review. Meaning to say, the whole application for judicial review in this case could be treated as coming before us afresh for the first time, despite the decision of the High Court. This is provided by s 69(1) of the Courts of Judicature Act 1964 ('the CJA'), which, inter alia, provides that appeals to this court shall be by way of rehearing and in relation to such appeals this court shall have all the powers and duties of the High Court. In addition, s 69(4) of the CJA provides that this court may, inter alia, give any judgment and make any orders which ought to have been made or given.

[44] In this regard, in the Federal Court case of *Government of Malaysia v Zainal bin Hashim* [1977] 2 MLJ 254, Suffian LP explained as follows:

> Appeals to this court are by way of rehearing and we may give any judgment, make any order which ought to have been given or made (by the trial court) and make such further or other orders as the case requires, s 69(1) and (4) of the Courts of Judicature Act No 7 of 1964. This means, on the authority of Quilter v Mapleson (1881–2) 9 QBD 672 that we are authorised to make such order on this appeal as ought to be made according to the law as it stands not at the time of the trial but at the time of this appeal.

Merits of the PSC's decision can be reviewed

[45] As stated, basically the learned HCJ found that the correctness of the decision made by the PSC against the appellant which resulted in his dismissal should not be within the purview of the courts. Essentially, to the High Court,

the PSC's decision should not be challenged as the PSC had total and unbridled power to make the decision it had made. As indicated, in support of this proposition, the learned HCJ referred to the Court of Appeal's decision in *T Ganeswaran* and the Federal Court's decision in *Vickneswary*. Also as explained earlier, towards this end, the learned HCJ found the decision of the PSC in concluding that the appellant had failed to exculpate himself from the charge was not irrational and unreasonable as it was up to the PSC to so decide. With respect, the learned HCJ erred on this issue.

[46] As opposed to the two cases above, there are at least three decisions of the Federal Court binding on the High Court, to the effect that decisions of inferior tribunals or decision making bodies could well be reviewed and scrutinised by the courts. These three cases of the apex court would mean the decision of the PSC is not the exclusive prerogative and the discretion of that body.

[47] First is the Federal Court case of *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 where it was held by Edgar Joseph Jr FCJ (as he then was) as follows:

> It is often said that judicial review is concerned not with the decision but the decision making process. This proposition may well convey the impression that the jurisdiction of the Courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected, or as stated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* where the impugned decision is flawed on the ground of procedural impropriety. *But Lord Diplock's other grounds for impugning a decision susceptible to judicial review makes it abundantly clear that such a decision is also open to challenge on ground of 'illegality' and 'irrationality' and in practice this permits the Courts to scrutinise such decisions not only for process, but also for substance*. Lord Diplock also mentioned 'proportionality' as a possible ground of review which called for development. (Emphasis added.)

[48] Therefore, *R Rama Chandran* is authority by the apex court that even the substance or merits of decisions of inferior tribunals and similar bodies are amenable to review by the courts. It is not merely the process of coming to a decision that may be challenged. Guided by this authority, the PSC's decision may similarly be questioned and reviewed by a court of law.

[49] The second decision of the Federal Court to the effect that the substance and merits of decisions by inferior tribunals, including the PSC, could be reviewed by the courts is *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee Bt Abdullah And Another* [2018] 2 MLJ 537. This case referred to *R Rama Chandran* and held not only the process but the substance of the inferior tribunal could be reviewed by the courts. In this case, the apex court said as follows:

[45] ... *Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process*:

> It is often said that judicial review is concerned not with the decision but the decision making process. (See eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
>
> But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, *this permits the courts to scrutinise such decisions not only for process, but also for substance*.
>
> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:
>
> > By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> >
> > By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
> >
> > I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its

jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

[46] Edgar Joseph Jr FCJ also thus summarised the role of the High Court when excising supervisory jurisdiction:

> The role of the High Court when exercising its supervisory jurisdiction on such instance as initially laid down in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223, has been explicitly spelled out in various judgments of our courts. I need only refer to the illuminating judgment of Jemuri Serjan SCJ (as he then was) in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 at pp 420–421 wherein he dealt with both the Anisminic and Wednesbury principles and in particular to the reproduction of Lord Reed's speech during which the following words appeared:
>
> > It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases, the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. (Emphasis added.)

[47] *The award of the IC could be reviewed for substance as well as for process*. In the instant case, the IC had lost sight of the issue when it proceeded to adjudicate on CBT instead of misconduct in employment. And when it proceeded to adjudicate on CBT instead of misconduct in employment, the IC acted without jurisdiction, took into account an irrelevant matter, namely [2018] 2 MLJ 537 at 573, but failed to take into account the relevant matter of evidence of misconduct and the complaint. As said, the complaint was that the respondents opened and operated the Perwira account without the authority of the company. The respondents did not deny that they opened and operated the Perwira account and that they deposited the money of the company into the Perwira account. The respondents explained that they did so to prevent the transfer of the company's funds to Singapore. But it was not appreciated that what the respondents had done was to put funds of the company in their absolute control and beyond the reach of the company. The

respondents might have been directors/minority shareholders of the company. But it was in their capacity as employees that the respondents had the day to day management of the company. And as employees with day to day management of the company, was it right for the respondents to put funds of the company in their absolute control and beyond the reach and control of the company? Would that behaviour not warrant dismissal? It must surely be that an employee who puts funds of his employer beyond the reach and control of his employer warrants dismissal. Any reasonable tribunal would find that the dismissal of the respondents was with just cause.

[48] The IC acted without jurisdiction, asked the wrong questions, applied the wrong law, utterly failed to rule on the alleged misconduct and explanation, and reached an irrational result. Though not for the same reasons, the High Court was nonetheless right to quash the award.

[49] For reasons herein, we unanimously allow these appeals, set aside the order of the Court of Appeal, and restore the order of the High Court.

The appeals allowed, the COA's decision set aside and the decision of the High Court restored. (Emphasis added.)

[50] In fact, the decision of *Akira* was followed by the Court of Appeal in *Country Garden Danga Bay Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* [2020] MLJU 81; [2020] 1 LNS 92 where it was stated as follows:

In a recent Federal Court case of *Akira Sales & Service (M) Sdn Bhd v Nadiah Lee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 2 CLJ 513, *the position of the law on judicial review was extended that the court not only can review the decision making process but also merit of the decision.* (Emphasis added.)

[51] It is therefore, clear that by the reason of the decision of the apex court in *Akira* above, even the substance or merits of a decision of an inferior tribunal may be reviewed by the courts.

[52] The third case of the Federal Court which supports the proposition that the merits or substance of an inferior tribunal or a decision making body could be challenged and subjected to review is *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629. In this case, Raus Sharif FCJ (later CJ) said as follows:

[15] We find that there is merit on the submission advanced by the learned counsel for the respondent. Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroads into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunals may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for

process but also for substance. It allowed the courts to go into the merit of the matter.

[53] *R Rama Chandran*, *Akira* and *Ranjit Kaur* are authorities from the highest court to say unequivocally the merits of the decision of PSC can be probed and questioned by the courts. Thus, these authorities recognised in essence the supervisory function of the courts to scrutinise the decision made.

[54] With the explanation above, we would conclude that this court in exercising its appellate function has the power to review and examine the substance and merits of the decision of the PSC. We intend to do so and the elaboration on our exercise in this regard, is as follows.

Reasons for challenge

[55] As a first step, it is necessary to bear in mind the instances or circumstances in a judicial review application where the decision of an inferior tribunal could be effectively challenged and thereby rendering such decision invalid. In the present case the decision being challenged is of course the decision of the first respondent. In this regard, the recent Federal Court case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 reminds us of the four broad reasons where such challenge could be made. The learned Tengku Maimun Tuan Mat CJ also referred to the House of Lords renowned case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, and said:

> Lord Diplock's speech in CCSU is heralded as the leading speech in the case. His Lordship held that the respondent/Minister's decision was questionable on the usual grounds of judicial review being 'illegality', 'irrationality' and 'procedural impropriety' while at the same time expressing the view, quite liberally, that judicial review is also expanding to include the ground of proportionality.

[56] Although the learned Tengku Maimun Tuan Mat Chief Justice gave a dissenting judgment in *Maria Chin,* the above grounds laid down by the House of Lords are well established. In fact, there is nothing to indicate that the majority judgment in *Maria Chin* disagreed on the four grounds listed above.

[57] Thus, based on the above authority, to reiterate, the four grounds upon which the decision of the first respondent may be challenged by way of judicial review are as follows:

(a) illegality;

(b) irrationality;

(c) procedural impropriety; and

(d) proportionality.

The need to provide reasons

[58] The Chairman of the first respondent swore an affidavit to contest the appellant's application for judicial review. She affirmed that she chaired the meeting that decided the appellant should be dismissed from service. In her affidavit, she also affirmed that the appellant had sent a representation to explain his action in respect of his statement in the Facebook. She affirmed that after considering the said representation, it was found that the appellant had failed to exculpate himself. However, she herself had failed to explain in the affidavit why she considered that the appellant had failed in doing so. She gave no reasons in her affidavit why she found that the appellant had failed to exculpate himself.

[59] In her affidavit, she did not say why the first respondent rejected the appellant's claim that he had meant to console the Prime Minister for the loss of his friend. This may be not acceptable to the first respondent but all the same, reasons must be given why this was rejected by the first respondent. The reasons given by the appellant why he had posted his statement in the Facebook, might be weak and lacking in substance, however, the first respondent must still address its mind as to why the reasons given were not considered sufficient to exculpate the appellant. Especially so when it was thought fit to dismiss the appellant from service. Dismissal being a very harsh punishment, at the very least the first respondent should have given reasons why the appellant's representation was not acceptable.

[60] It is not sufficient for her to merely state that she carefully had considered the appellant's representation. It is also insufficient for her to merely say that the appellant's representation did not exculpate him from the charge. These statements were bereft of substance as there were no reasons given why there was no merit to the appellant's representation.

[61] Likewise, in her affidavit she did not explain why the first respondent could not accept the representation of the appellant that his statement in the Facebook did not tarnish the image of the Malaysian Government. Since the appellant asserted in his representation that his Facebook posting did not tarnish the name of the Malaysian Government, the respondent must rebut this assertion with reasons. This must be done to justify the dismissal of the appellant. Unfortunately, there were no reasons provided by the respondents. In fact, in her affidavit, she had acknowledged that the appellant had explained the reasons for his action.

[62] Similarly, the appellant had stated in his representation that his comments in the Facebook had been misinterpreted and had been distorted to his detriment. However, there is no explanation or reason given by the first respondent why this was not an acceptable explanation. The first respondent failed to give any reason why this explanation by the appellant was not accepted or countenanced.

[63] In fact, there is a letter from the first respondent to the appellant dated 14 February 2017 stating that the appellant had been asked to submit a representation. In this letter, the first respondent acknowledged that the representation had been sent and the appellant was informed that he had been dismissed from service. The letter did not at all explain the reasons why the first respondent had rejected the defences raised in the representation.

[64] An affidavit was also filed by the Head of Department of the appellant. He affirmed the affidavit on behalf of the PSC and the second respondent. Most of what he affirmed to in his affidavit were a repetition of the affidavit of the Chairman of the first respondent. Similarly, in his affidavit, there were no reasons stated as to why the appellant's representation in answering the charge was not accepted.

[65] It is incumbent on both respondents not to merely say the appellant did not exculpate himself in respect of the charge against him by the representation he had sent. These statements made that are without any basis given, no matter how strenuously made, remain devoid of any substance or weight. Both respondents, especially first respondent, are duty bound to explain and given reasons for rejecting the grounds given by the appellant in his representation in answering the charge. Unfortunately, this was not done by the respondents as is evident from the affidavits filed.

[66] Further, the failure of the first respondent to explain why the appellant was found not able to exculpate himself, also gives credence to the contention that the first respondent did not sufficiently consider the appellant's defences. If indeed the first respondent had taken into account the appellant's defences and had rationally considered the same, surely reasons could be provided for rejecting the appellant's defences.

[67] A recent case on judicial review explaining the need to provide reasons for a decision is to be found in the decision of this court in *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors* [2021] 3 MLJ 1. Our learned sister, Mary Lim JCA (now FCJ) in delivering the judgment of the court, went through a number of cases and clearly explained as follows:

> [112] Then, there is the matter of duty to give reasons. We would have thought that the law on this issue is fairly clear and settled from the early years of *Rohana bte*

Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 where it was ruled that a reasoned decision can be an additional constituent of the concept of fairness' and where the reasons have to be given so that the right of appeal may be properly and meaningfully exercised; to *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 ('MPPP') where the Federal Court extensively reasoned on why there must be this duty to give reasons even if there is no express provision for such duty. According to the Federal Court, this duty to give reasons emanates from the concept of fairness; see also *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 4 CLJ 265 and *Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia* [2017] 6 MLJ 586; [2017] 10 CLJ 36 (see discussions of the same in *Save Britain's Heritage v Secretary of State for the Environment and others* [1991] 2 All ER 10).

[113] The absence of an express provision in any statute requiring the decision-maker to give reasons does not mean that the duty does not exist unless and until the statute specifically states so. Even then, the case law has developed progressively to instill an innate will on public authorities to explain their decisions. The Federal Court in Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd categorically held that 'The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large'.

[117] Giving reasons without being compelled, is not just grounded in fairness but, as expressed by the Supreme Court in Mandalia v Secretary of State for the Home Department citing Laws LJ in *R (on the application of Nadarajah) v Secretary* of State for the *Home Department R (on the application of Abdi) v Secretary of State for the Home Department* [2005] All ER (D) 283; [2005] EWCA Civ 1363 (Nov) 'a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public'. This results in better decision-making, or better informed decision-making and it reflects the 'democratic principle at the heart of our society' as expressed in *R (on the application of Moseley) v Haringey London Borough Council* [2015] 1 All ER 495.

[118] Similar views were expressed by the Federal Court in MPPP. After discussing amongst others, Rohana bte Ariffin & Anor v Universiti Sains Malaysia where it was ruled that 'a reasoned decision can be an additional constituent of the concept of fairness'; and agreeing with the Privy Council decision in *Stefan v General Medical Council* [1999] 1 WLR 1293 that despite the absence of express statutory obligation to state reasons and neither could it be implied such an obligation, the Privy Council found that there was power to give reasons, as:

> ... giving reasons can be beneficial and assist justice: (1) in a complex case to enable the doctor to understand the Committee's reasons for finding against him; (2) where guidance can usefully be provided to the profession, especially in difficult fields of practice such as the treatment of drug addicts; and (3) because a reasoned finding can improve and strengthen the appeal process.

The Federal Court proceeded to hold at p 64:

> We endorse the principles enunciated by the Privy Council in Dr Stefan

> and say that in the exceptional circumstances of this case and having regard to the trend towards increased openness in matters of Government and administration, as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition ...

[119] In *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495; [2016] 5 MLRA 503, Abang Iskandar JCA (now CJ (Sabah and Sarawak)) when dealing with the issue of duty to give reasons in the context of revocation of alienation of land expressed the following view:

> [45] ... the principle as stipulated in the Sri Lempah Enterprise case is applicable in cases involving exercise of discretion, absolute or otherwise. High authorities have shown such phrase to be a gross anomaly that cannot pretend to even co-exist (see for instance: *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 All ER 625). In exercise of a public power, there is no escaping the obligation on the part of the decision-maker to act reasonably in the peculiar circumstances of the case that appears before him. One of the fundamental features in modern administrative law jurisprudence has been the growing need for the public decision-maker to give reasons for his decision. It may be inconvenient to do so. But it is an indivisible component in all decision-making processes. We find that every decision, both good and bad, is driven to such conclusion by a reason. Learned Justice Zainun Ali JCA (as she then was) in the case of *Datuk Justin Jinggut v Pendaftar Pertubuhan* [2012] 3 MLJ 212 had said this:
>
> > Thus if no reason is given by the respondent, it is open for this court to conclude that he had no good reason in as much as it is open for us to conclude that the respondent had not exercised his discretion in accordance with the law.

[120] His Lordship further added:

> ... we could not find any statute which contains express provisions that affirmatively prohibit a public officer, as a decision-maker, in the discharge of his public duty,[from assigning any reason for his decision. Indeed, it would be most strange, if there as one such statute. We say so because it would defeat the essence of good governance and that it would not promote accountability and owning up to responsibility in decision-making. As such, the silence in a statute requiring that a reason or reasons be given by the decision-maker ought not to be taken to mean there was therefore no duty to give reasons. The silence in the statute, on the duty to give reason for a decision, ought not to be made a cloak or a blanket under which the decision-maker could conveniently find refuge so that the rationale for his decision remains shrouded in mystery, privy only to himself, but not to the public at large, on whose behalf, he is entrusted to discharge that duty. That scenario would indeed be a contradiction in terms.

[68] The lengthy explanation in the above case law clearly establishes the need for the first respondent to provide the reasons for its decision. Since the same had failed to furnish those reasons, it follows its decision could not stand.

The comments

[69] As reflected in the charge, the appellant's statement in Facebook was said by the first respondent to be in contravention of r 19(1)(b) of the 1993 Regulations which states as follows:

> An officer shall not, orally or in writing or in any other manner *make any public statement which may embarrass or bring disrepute to the Government*. (Emphasis added.)

[70] The action of the appellant was also said to be in contravention of r 4(2)(d) and (2)(g) of the 1993 Regulations which provides as follows:

> An officer shall not
>
> (d) conduct himself in such a manner as to bring the public service into disrepute or bring discredit to the public service;
>
> (g) be irresponsible;
>
> ...

[71] Thus, it is incumbent to determine whether the appellant's statement ie 'Kesian. Hilang kwn, hilang deposit' had contravened the above provisions.

[72] First, it should be remembered, as explained earlier, not only the process of arriving at the decision that the first respondent did is subject to review but the merits of that decision may also be subjected to scrutiny.

[73] Second, as pointed out, the first respondent did not give any reason why it had rejected the representation made by the appellant. Without reasons, the representation should be reviewed in this appeal to determine the effect of the appellant's statement as it is said to be in contravention of the statutory provisions.

[74] Therefore, it is important to always note these two points when we embark in determining whether the comments itself had contravened the above provisions.

[75] Thus, is the statement 'Kesian. Hilang kwn, hilang deposit', a statement which may embarrass or bring disrepute to the Government within the

provisions of r 19(1)(b) of the 1993 Regulations? As translated, could the statement 'Pity. Lost a friend, lost the deposit' be an embarrassment or bring disrepute to the government?

[76] In our view, even if the statement was to be taken as a whole it could not be an embarrassment or disrepute to the government itself because:

(a) it is not only too short but more importantly, too cryptic;

(b) different groups of people may interpret the statement differently; and

(c) the government itself could not possibly be affected by the statement.

[77] With regard to the three reasons above, first the statement made is too short to suggest that it may have the effect of embarrassing the government or bringing disrepute to it. With respect, it is too brief to be able to have that negative effect. It is difficult to appreciate how the statement, consisting of those few words could be an embarrassment or bring disrepute to the government. It is noteworthy that the concern here is with regard to a government. A government by normal standards is a substantial entity. The short cryptic statement by the appellant consisting of the words used could not possibly cause any embarrassment or bring disrepute to an entity the likes of a government.

[78] The comments are too general to be able to attract any specific meaning. The statement itself is cryptic. The statement as worded can itself give rise to many connotations and shades of meaning. To some, taken literally, it may appear to have no meaning. After all, what has a friend got to do with a deposit? In this regard the benefit of the doubt should be given to the appellant. As explain earlier, he asserted he had no intention to tarnish the image of the Malaysian government. In any event, the image of the government itself could not possibly be affected by such a cryptic and inconsequential statement.

[79] In fact, according to the appellant, in his affidavit which was unrebutted by the respondents, the displeasure and anger arising from the comments came initially by a named cybertrooper of UMNO, the political party of DS Najib, where he was the then president of that party. In this regard, the caution stated by the Federal Court in *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361 should be borne in mind:

> We may just as well mention that these public offices are more than just jobs. The special protection under the modern view is for trying to preserve as far as possible the independence of the holders of these public offices against *victimization by their superior officers or their political masters.* (Emphasis added.)

[80] As indicated, all the above findings of the court are made possible no less by the failure of the first respondent to give reasons for its decision. In the absence of reasons by the first respondent, the explanations above stand as grounds why the appellant should not have been found guilty of the charge levelled against him.

Punishment

[81] In his affidavit in reply, the appellant alluded to a similar case against one Mohd Radzi bin Mansor who was also charged for tarnishing the name of the Malaysian Government. However, Mohd Radzi was given a lesser punishment instead of dismissal from public service. He was sentenced with a reduction in salary and no increment for three years.

[82] Both respondents chose not to reply to the appellant's affidavit on this point. The failure to reply, coupled with the lack of any explanation, meant that the respondents accepted the assertion of the appellant regarding the fact of the disparity in the sentences meted out. In this regard, the celebrated decision of the Court of Appeal in *Ng Hee Thong & Anor v Public Bank Berhad* [2002] 2 MLJ 29 is relevant wherein the Court of Appeal stated as follows:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v O'Brien* [1988] 3 MLJ 332.

[83] There is also no explanation by the first respondent why the appellant must be punished with dismissal from service and not reduction in rank instead, for example. As stated earlier, reasons must be given.

[84] In the affidavit in support, the appellant had asserted that he had served for eight years and he has had an otherwise good record. There is again no reply by the respondents on this assertion. The appellant also asserted that before the decision to dismiss him from service was made by the first respondent, he was never asked to mitigate against sentence.

[85] There are several aspects to consider from the facts above narrated regarding the punishment imposed on the appellant.

[86] First, proportionality as indicated earlier is another ground upon which the decision of the first respondent may to be challenged. In the context of the present case, can the appellant's statement justify his dismissal from service? We have explained that the statement could not have infringed the statutory provisions. Therefore, the appellant could not be guilty of the charge and there

A can be no justification for his dismissal. In any event, was the punishment meted out proportionate to the alleged misconduct and in any event is dismissal from service a fair punishment? In this regard, the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 expressed the view that
B proportionality of course, embodies the basic principle of fairness.

[87] In addition, the right to mitigate before sentencing is a right well established. The right to mitigate is now trite and fundamental as it has been accepted that sentence should not be meted out unless the person concerned is
C heard. This is an issue of fairness to be accorded a person before sentencing. Especially when the disciplinary action taken, as earlier stated, was with the view to dismissing him or to reduce his rank. Had the right to mitigate been afforded, there is always the possibility that he might not be dismissed from
D service. The fact is before the sentence to dismiss him was made, he was not asked to mitigate. Rightly, the decision of the first respondent ought not to stand based on this reason too. Thus, even if it may be right to maintain that an inferior tribunal has the right to sentence as it wishes, before that right is exercised, the person facing that tribunal must be given the right to mitigate.

E

[88] In any event, the impugned statement even if rightly objectionable, does not justify so extreme a punishment as an outright dismissal of the appellant from service. As stated, the statement was trivial and innocuous. Hence, the punishment of dismissal from service was disproportionate if not
F also unreasonable. Especially when one considers the good track record of the appellant. In any event, as the appellant did not contravened the statutory provisions, no punishment should be meted out.

Alleged curtailment of freedom of expression

G

[89] With respect to the argument that a subsidiary legislation ie the 1993 Regulations, could not be used to curtail the appellant's right to freedom of expression provided under art 10(1)(a) of the Federal Constitution, first it must be noted that the appellant did not seek for a declaration that 1993 Regulations
H is ultra vires art 10(1)(a) of the Federal Constitution. Since this has not been sought by the appellant, there is no necessity to address this issue now. Further, even without this issue, the appellant, based on other issues as explained, should succeed in the appeal.

I **[90]** Even if there is still a need to address the same, first the learned HCJ correctly found that once the appellant joined the public service, he is bound by all laws and regulations with regard to public servants, including the 1993 Regulations. As noted at the High Court, Suffian FJ in the Federal Court case of *Government of Malaysia v Rosalind Oh Lee Pek Inn* [1973] 1 MLJ 222 in this

regard held as follows:

> I should add that the contract between a public servant such as the plaintiff and the government is of a very special kind, for as was stated by Ramaswami J at page 1894 when delivering the judgment of the Indian Supreme Court in *Roshan Lal v Union of India AIA* [1967] SC 1889:
>
> > It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. *But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by Government … The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties*. (Emphasis added.)

[91] Therefore, the learned HCJ was right to find that since the 1993 Regulations has not been found to be ultra vires art 10(1)(a) of the Federal Constitution, the appellant must be bound by the same. Thus, r 19(1)(b) of the 1993 Regulations could not be said to render his freedom of expression as illusory.

CONCLUSION

[92] The High Court with respect, erred in not recognising that the merits of the first respondent's decision may be challenged by the appellant. The failure of the first respondent to give reasons for rejecting the appellant's representation and thereby dismissing the appellant from service, rendered its decision invalid. Further, the statement posted by the appellant in the Facebook did not contravene the statutory provisions as stated in the charge.

[93] Therefore, we are unanimous in allowing the appellant's appeal and with respect, in setting aside the High Court's order. Accordingly as sought by the appellant, an order of certiorari to quash the decision of the first respondent is granted. A declaration is also allowed that the appellant is entitled to all salaries and benefits from the date of his purported dismissal.

Appeal allowed; High Court's order set aside; order of certiorari to quash decision of first respondent granted; declaration that appellant was entitled to all salaries and benefits from the date of his purported dismissal allowed.

Reported by Dzulqarnain bin Ab Fatar